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THOMAS F. MCFARLAND

November 3, 2004

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

NOV - 4 2004

Part of
Public Record



Re: Docket No. AB-882, *City of New Brighton, Minnesota -- Adverse Abandonment and Discontinuance -- Minnesota Commercial Railway in Ramsey County, MN*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply To Petition For Waiver And Exemption, for filing with the Board in the above referenced matter.

Very truly yours,

Tom McFarland

Thomas F. McFarland
*Attorney for Minnesota Commercial
Railway Company*

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF NEW BRIGHTON, MINNESOTA)
-- ADVERSE ABANDONMENT AND) DOCKET NO.
DISCONTINUANCE -- MINNESOTA) AB-882
COMMERCIAL RAILWAY COMPANY)
IN RAMSEY COUNTY, MN^{1/})



REPLY TO PETITION FOR
WAIVER AND EXEMPTION

ENTERED
Office of Proceedings

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Part of
Public Record

MINNESOTA COMMERCIAL RAILWAY COMPANY
14047 Petronella Drive, Suite 201
Libertyville, IL 60048-1500

Respondent

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Respondent

DUE DATE: November 4, 2004

^{1/} The caption in the Petition has been revised to reflect that the City of New Brighton, Minnesota is seeking abandonment authority, not Minnesota Commercial Railway Company (who opposes abandonment).

BEFORE THE
SURFACE TRANSPORTATION BOARD

CITY OF NEW BRIGHTON, MINNESOTA)	
-- ADVERSE ABANDONMENT AND)	DOCKET NO.
DISCONTINUANCE -- MINNESOTA)	AB-882
COMMERCIAL RAILWAY COMPANY)	
IN RAMSEY COUNTY, MN)	
)	

**REPLY TO PETITION FOR
WAIVER AND EXEMPTION**

Pursuant to 49 C.F.R. § 1104.13(a), MINNESOTA COMMERCIAL RAILWAY COMPANY (MCR) hereby replies to a Petition for Waiver and Exemption of Certain Abandonment Application Requirements (Petition) filed in behalf of City of New Brighton, Minnesota (the City) on October 15, 2004.

STATEMENT OF THE CASE

The City has filed the Petition in conjunction with an adverse abandonment application that it intends to file directed to a segment of rail line that extends between the west edge of Old Highway 8 and a railroad bridge over Interstate Highway 35 West, a distance of 1,458 feet, or a little more than one quarter of a mile, in New Brighton, Minnesota ("the abandonment segment"). The City proposes to redevelop the abandonment segment for nonrail use as part of an "office campus" for a manufacturer of medical devices. (Petition at 3). However, there is no evidence in the Petition that the manufacturer has committed to development of an office campus at the site of the abandonment segment. In fact, that manufacturer has not made any such

commitment, but instead has locations in addition to New Brighton under active consideration as a site for its office campus.^{2/}

The abandonment segment is owned by MT Properties, Inc. (MT), a noncarrier, and is operated by MCR pursuant to a long-term lease from MT. *See Minnesota Commercial Railway Company -- Acquisition and Operation Exemption -- Minnesota Transfer Railway Company*, ICC Finance Docket No. 30987, notice of exemption served Feb. 20, 1987 (not printed). It is part of a lengthier rail line commonly known as the Butcher Spur, which is a misnomer inasmuch as it is a line of railroad rather than spur track as referred to in 49 U.S.C. § 10906. Attached to this Reply as Appendix 2 is a map which shows the abandonment segment shaded in yellow between Old Highway 8 and I-35 West, and the western portion of the Butcher Spur between an MCR main track and Old Highway 8 shaded in pink. All of the Butcher Spur shown in Appendix 2 is located in New Brighton, Minnesota. There is an additional segment of the Butcher Spur located east of I-35 West in Arden Hills, Minnesota (Arden Hills segment) that is not shown in Appendix 1. MCR intends to voluntarily seek abandonment and discontinuance authority for the Arden Hills segment in the near future. The City's reference at page 2 of its Petition to a prospective abandonment is to abandonment of the Arden Hills segment, not the abandonment segment in New Brighton.

^{2/} Attached to this Reply as Appendix 1 is a copy of an article entitled "Medtronic Puts Off Development Answer" that appeared in the October 2, 2004 issue of the St. Paul Pioneer Press, which states that Medtronic acknowledged negotiating with other cities for sites.

The Petition is replete with false allegations that the abandonment segment is not used or required for rail service^{3/}, viz.:

- (1) "... this is not an active line ..." (p. 2)
- (2) "... (the City) believes that the line has been unused for at least two years." (p. 3)
- (3) "... The City believes that there are no entities that use, or have recently used, the line for rail transportation ..." (p.4)
- (4) "... The City believes that MCRC is not currently providing service on the line ... " (p. 5)
- (5) "... The line has not handled any traffic for some time ..." (p. 5)
- (6) "... the City believes that there are no entities that currently use, or have recently used, the line for rail transportation ..." (p. 5)
- (7) "... The line is of little or no actual use to any shipper or carrier ..." (p. 7)
- (8) "... the line is currently out of use by any shipper or carrier, and there is only one shipper on the line whose property could potentially be transported by rail" (pp.7-8).

Thus, the City appears to be under the mistaken impression that the abandonment segment has been *de facto* abandoned for a lengthy period of time, such that its adverse abandonment would be authorized in accordance with a line of decisions typified by *Modern Handcraft, Inc.* -

^{3/} The City also falsely alleged at page 3 of the Petition that it provided "generous incentives" for MCR to voluntarily discontinue operations on the abandonment segment. The true facts in that respect are contained in a letter from Mr. John W. Gohmann to Mr. Thomas F. McFarland, dated October 29, 2004, copy of which is attached to this Reply as Appendix 3.

Abandonment, 363 I.C.C. 969, 972 (1981), and *Chelsea Property Owners -- Aban. -- The Consol. R. Corp.*, 8 I.C.C.2d 773 791-792 (1992).

In truth, however, the entire abandonment segment is used and required by MCR and shippers for the provision of rail service. In that respect, attached to this Reply as Appendix 4 is a letter to the Board dated October 20, 2004 from Messrs. Todd Montreuil and David Chadima, owners of Boulder Images Incorporated of Rosemount, Minnesota.^{4/} That letter establishes that Boulder Images has used the abandonment segment as a team track to receive and distribute 54 rail carloads of boulders in the past 18 months, and that Boulder Images has a signed contract to receive an additional 45 to 55 carloads of boulders on the abandonment segment this upcoming winter. Boulder Images relies on the abandonment segment for rail delivery of boulders because it does not have its own track in the Twin Cities area for receipt of rail shipments.

By no means is that the only present and prospective rail use of the abandonment segment. Attached to this Reply as Appendix 5 is a letter to the Board dated October 22, 2004 from Mr. David R. Sina, President of Five Star of Champlin, MN. Five Star used the eastern portion of the Butcher Spur in the recent past as a team track to receive 160 carloads of salt. Five Star plans to use the abandonment segment this fall and winter for receipt of salt and snow melting products. Five Star plans to use the abandonment segment next spring and continuing thereafter for transloading construction products and materials. Five Star will use the abandonment segment as a strategically located team track for distribution of salt, snow melting products and construction materials.

^{4/} The City's Petition at page 2 incorrectly refers to Boulder Images of Rosemount, MN as Landscape Junction of Lakeville, MN. There is no relationship between those two companies.

Attached to this Reply as Appendix 6 is a letter to the Board dated October 25, 2004 from Mr. Blair B. Bury, Vice President of Midwest Asphalt Corporation. Midwest owns and operates a hot-mix asphalt facility on the Butcher Spur just to the west of Old Highway 8 and the abandonment segment. In the past 14 months, Midwest received over 850 carloads of aggregates by rail at that location. Midwest sometimes receives its aggregates in 20-car or 30-car shipments. When that occurs, MCR is required to use the abandonment segment as tail room for 10 to 20 cars of those cars at a time while the remaining cars are being placed for unloading at Midwest. Inasmuch as railcars have a length of roughly 60 feet each, use of the abandonment segment as tail room for 20 cars plus the locomotive occupies virtually the entire length of the abandonment segment.

Attached to this Reply as Appendix 7 is a letter to the Board dated October 20, 2004 from Mr. Seth Brinkman, Director of Operations of Commercial Transload of Minnesota, Fridley, MN. Commercial Transload is a subsidiary of MCR. Commercial Transload actively markets the abandonment segment as a superior location for rail-truck transloading of steel and wood construction products because of its rail access and its location adjacent to an interstate highway.

The foregoing broad-based evidence of present and prospective rail use and need for the abandonment segment for the provision of rail service, implicates a distinct line of decisions in which adverse abandonment has consistently been denied where the rail carrier operating the line has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.

*See, e.g., Western Stock Show Assn. -- Aban. Exemption -- in Denver, CO, 1 S.T.B. 113, 134-136 (1996); Salt Lake City Corporation -- Adverse Abandonment -- in Salt Lake City, UT, 2002 STB LEXIS 150 at *16-18 (STB Docket No. AB-33 [Sub-No. 183], decision served March 8, 2002);*

and *New York Cross Harbor Railroad v. STB*, 374 F.3d 1177, 1184-1186 (D.C. Cir. 2004). In the *Salt Lake City* case, the Board said (at *16):

... UP is operating over the Line, and states that it is ready, willing and able to operate over the Line in the future. Neither the Board, nor the Interstate Commerce Commission before it, has ever granted an adverse abandonment when the carrier was operating over the line ... (emphasis added).

In contrast to the characterization of the rail line as inactive in the City's Petition, the line is thus shown to be used and required for rail operations on both a current and prospective basis.

REPLY TO REQUESTS FOR WAIVER AND EXEMPTION

MCR does not oppose the City's requests for waivers and exemptions, as such.

However, MCR is hopeful that upon review of this Reply, the City will realize that the abandonment segment is very much used and required for rail operations by MCR, such that the Board is virtually certain to deny adverse abandonment of the segment consistently with the precedent cited in this Reply. It is hoped that the City will accordingly refrain from filing an adverse abandonment application for the segment inasmuch as such filing surely would be a futile act.

Respectfully submitted,

MINNESOTA COMMERCIAL RAILWAY COMPANY
14047 Petronella Drive, Suite 201
Libertyville, IL 60048-1500

Respondent

Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Respondent

DUE DATE: November 4, 2004

NEW BRIGHTON

Medtronic puts off development answer

City asked for letter of intent on development

BY ALLEN POWELL II
Pioneer Press

New Brighton officials expect to know by November whether Medtronic Inc. will be part of the city's massive Northwest Quadrant redevelopment or if the city should pursue other tenants.

City officials had asked Medtronic to sign a letter of intent by Thursday outlining the basic terms for the construction of a 500,000- to 800,000 square-foot office complex along the east side of Old Highway 8, said City Manager Matt Fulton. The company told the city that it would let them know by November.

A letter of intent is a good-faith deal that both sides build on. A precursor to a development agreement, it is non-binding and would finally solidify Medtronic's intentions to bring more than 1,000 jobs to New Brighton, Fulton said. The city refused to provide a copy of the letter of intent.

City officials have been seeking a commitment from Medtronic for more than a year, with both sides making numerous revisions to proposals. The city has tried to align current plans for about 750 new housing

units on the opposite side of Old Highway 8 with the possible Medtronic development, but the company has refused to assist them, said Mayor Steve Larson.

Larson was adamant that Medtronic is still the city's preferred tenant for the site. But the city wants to begin construction in the area by summer 2005, and it needs more information about Medtronic's plans to keep that schedule, Larson said.

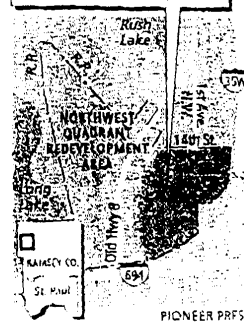
"What we want to do is find out for sure if they want to be a part of this project," Larson said. "If they're going to keep playing us on a string, we have to get something done."

New Brighton recently received a \$51,000 grant from the Metropolitan Council for planning at the site. The city will develop one plan that includes Medtronic and one that doesn't.

If Medtronic asks for more time to decide in November, the city will have to decide whether to allow that or move forward without them, Fulton said. He would not give a deadline for when Medtronic must make their plans known.

Officials said separate plans were not considered until after Medtronic confirmed to Fulton

Proposed site for the Medtronic development



a report in the Pioneer Press that the company was negotiating with other cities for sites. The company appears to be considering Mounds View's Bridges of Mounds View golf course.

But Fulton and Larson said that revelation had little to do with the city's decision. Larson said the city's obligation to its residents is to move forward with the project soon, even if it means Medtronic isn't involved.

"We need a commitment," Larson said.

Medtronic officials refused to discuss their plans and would not even confirm that they were considering an expansion.



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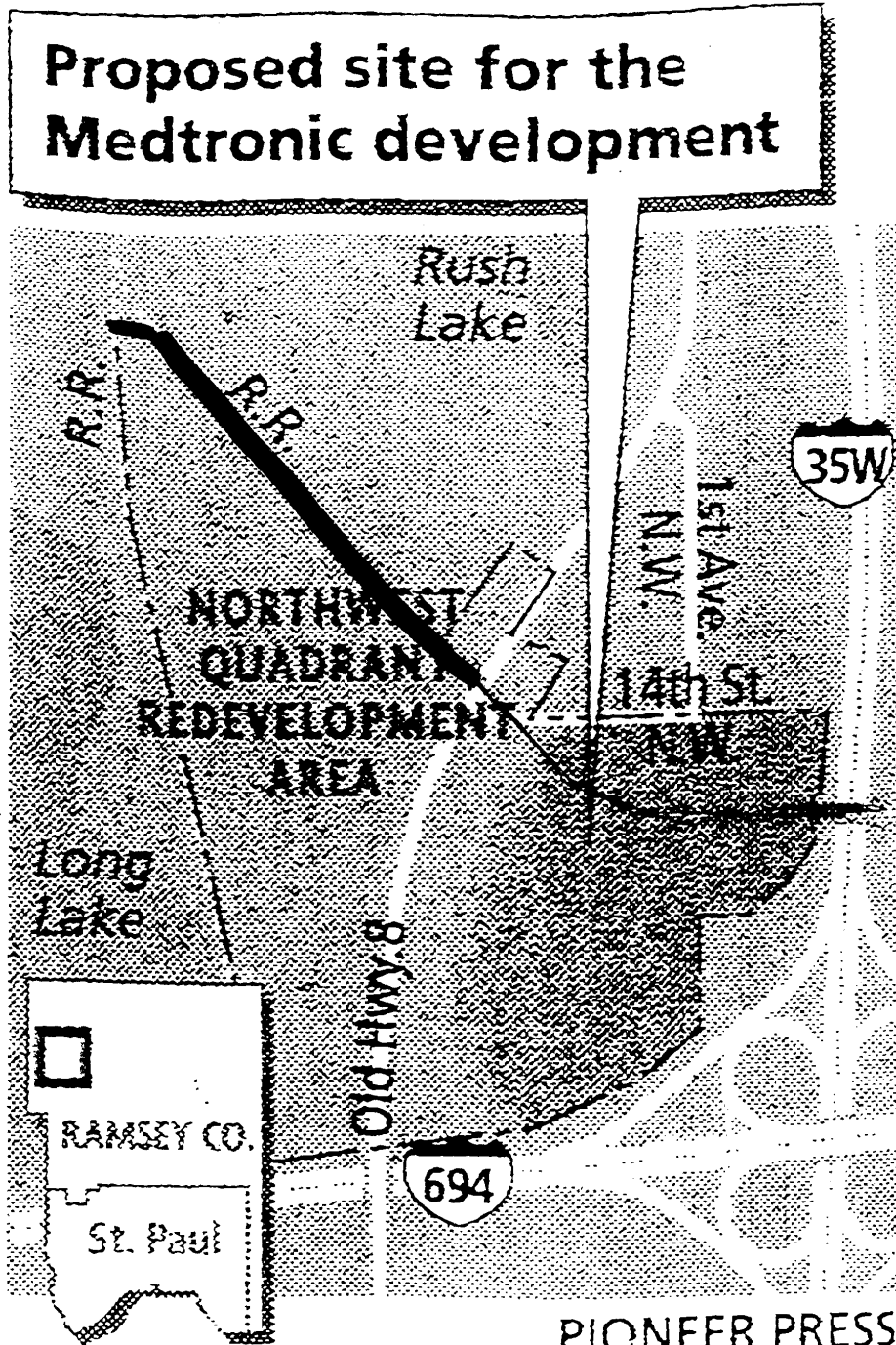
5 Twin Cities Locations

Roseville Roseville Square 1936 West County Rd. C <i>(near Bryn Mawr)</i>	West St. Paul So. Robert Street Plaza 2030 So. Robert Street <i>(next to Marshfields across from CUB)</i>	Brooklyn Center Brookdale Shopping Center 1265 Brookdale <i>(Old J.C. Penny's/Dial Parking Lot)</i>	Wayzata Wayzata Bay Center 831 East Lake Street <i>(next to Four Seasons)</i>	Richfield Soundside Square 2930 W. 66th Street at York <i>(next to Elements)</i>
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COMMERCIAL TRANSLOAD OF
MINNESOTA

John W. Gohmann, Chairman, President
14047 Petronella Drive, Suite 201
Libertyville, Ill. 60048
p. 847-549-0486, fax 847-549-0485
toll free 888-489-2326
email: johngohmann@msn.com

Appendix 3
Pg 1 of 2

October 29th, 2004

Mr. Thomas F. McFarland,
Attorney
208 LaSalle St., S. 1890,
Chicago, Ill. 60604-1112

In re: City of New Brighton Petition

Dear Mr. McFarland:

Reference made to some statements in the filing of the City and the letters from their Project Manager, Mr. Nagel, alleging the City made some "generous offers" which were not accepted regarding this matter. That is not true.

In early March of 2004, their City Manager asked me to partake in an hour conference call with his people, which I did voluntarily. I told them that if they would provide us a functional replacement for the track at their expense, we would gladly consider relocating this team track. Mr. Larson of MT Properties (our "landlord") and myself were asked to come to a meeting in New Brighton in May of this year with the Project Manager, Mr. Nagel, and, we heard Mr. Nagel concur they would develop some alternate sites they would propose to us for this replacement. I wrote them several times in June, July, August and even late September reminding them that until they could provide some usable and truck accessible functional replacement area, we could proceed no further. In July or August, a letter from Mr. Nagel indicated they would provide this and pay for an abandonment application at no expense to us. To this date, they have failed to provide one drawing or engineering plan for any replacement. I wrote them a few weeks before their filing of this petition advising that because of winter weather conditions and frost in the ground, that even if they provided one now, it would be too late for construction this fall, as the frost can set into the ground making excavation impossible as early as the first or second week of November and that aggregate quarries who would be used for track ballast close about this same time for the year.

The "medical park" with Medtronics is not at all a certainty as the Pioneer Press article indicates - others are also soliciting this in the metro area. This or any other development of the property is claimed to be a several hundred million or billion dollar project - and a replacement of the track to a usable, acceptable location elsewhere in New Brighton would be a "deminimus" fraction of the cost, probably under \$100,000.00. But, without arguing the motives or merits of New Brighton's plans, they have not even followed through on what they indicated they

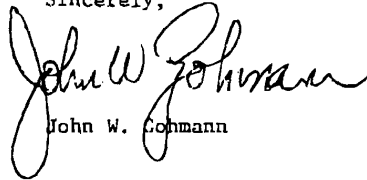
CHOICE INDUSTRIAL AND RELOAD SITES

Efficient, On Time Service Connecting Daily with All the Railroads of
the Twin Cities. Intermodal, Reload, and Trucking Provided by our
Subsidiary, Commercial Transload of Minnesota

page two

would do to allow us to consider abandoning this active trackage.

Sincerely,


John W. Conmann



3803 154th St. W. • Rosemount, MN 55068

phone 651-322-7499 • fax 651-322-7754

TO: The US Surface Transportation Board

10/20/04

We have just been advised that the City of New Brighton is attempting to take by adverse possession the team track we have been using just east of Old Highway 8.

This location, since we do not have a spur track in the Twin Cities area, has been the primary location for transloading both decorative and structural boulders used to build boulder retaining walls and boulder landscaping through out the entire metro area. The boulders are off loaded from the rail cars, temporarily stored and delivered by truck to many job sites around the Twin Cities area. Recently we have signed a contract with a supplier to ship between 45 and 55 cars of boulders this winter. Again the storage and distribution would come from the New Brighton Team Track. Our plans are to use this track more and more in the future as demand continues to increase. In the 18 plus months we have used the New Brighton Team track, we have unloaded over 54 rail cars and in the near future have business plans that will easily double or triple this amount.

There is no alternative area or trackage we can use, and if we lose this location our business and the services we provide to the Twin Cities area would be devastating to our operation. Our suppliers are Iowa and Wisconsin based companies without rail, transportation of boulders is virtually impossible except by cost prohibitive trucking.

This is an active track used not only by Boulder Images, but other companies as well. We ask that the Surface Transportation Board consider our situation and REFUSE the City of New Brighton to take this property. It is my understanding that the city has made no effort at all to work with the Minnesota Commercial to find a replacement facility for us to unload our products on.

Thank you

Todd Montreuil
President/Owner

David Chadima
CFO/ Owner

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October 22, 2004

To: U.S. Surface Transportation Board

Minnesota Commercial Railway Company just advised me that the City of New Brighton has filed an adverse possession action against them for a portion of the Butcher spur east of Highway 8 in New Brighton, Minnesota.

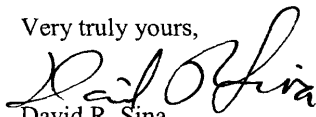
My company has in the past used this track to unload salt from covered hopper cars. In fact, in 1996-1998, we unloaded and transloaded into trucks almost 200 carloads of salt which were distributed to local, city, county and municipal governments from this area. The location is one of the few remaining teamtracks left in a 15 mile area where product can be handled competitively and at much lower cost than truck to this track, near to these areas, and, then distributed the last few miles by truck.

I contacted the Minnesota Commercial over 45 days ago and expressed an interest in commencing this salt distribution business again this fall and winter. My plans are to again use this siding and team track this coming fall and winter for salt and snow melting products for consumption by local, state and county municipalities and also for commercial accounts. Next spring, and continuing thereafter, I plan to use this track for transloading and reloading of various construction products and materials, serving contractors and builders in the entire Twin Cities metropolitan area.

We vehemently object to the attempt by the City of New Brighton to take the Butcher spur east of Highway 8 by adverse possession as it is an actively used rail siding with growing economic and historic economic importance to a wide variety of businesses in this area.

Thank you.

Very truly yours,


David R. Sina
President



Appendix 6

P.O. BOX 5477 • HOPKINS, MINNESOTA • 55343
PHONE: (952) 937-8033 • FAX: (952) 937-6910



October 25, 2004

To: The US Surface Transportation Board

We have just learned that the City of New Brighton has filed an adverse possession action against Minnesota Commercial Railway for that portion of Old Highway 8 and easterly trackage of the spur line serving our Hot Mix Asphalt Facility.

Our company has maintained a constant use of rail, and the Butcher Spur track East of Highway 8 is an extension of the track which serves us. In the past fourteen months, we have received over 850 carloads of aggregate by rail. We plan on continuing to use rail into the future as due to the depletion of acceptable aggregate in the metro area, more and more will have to be brought in by rail not only in 2005, but, in years to come. We are aware that in order to sometimes handle the 20 or 30 car cuts that come to us, Minnesota Commercial locomotives and crews have to shove cars we have made empty over Highway 8 and use the track which the City would like to condemn as tail room. As our usage grows, this will occur more and more frequently, and the need to use this trackage for tail room to make this switch will be vital to landing our increased traffic.

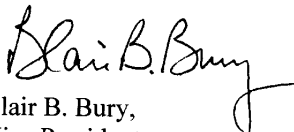
As an aside, the City has also filed a notice to condemn our 33 acres and our entire operation. We are contesting the Public Purpose issue and plan to fight this vigorously, given the recent decision of the Supreme Court of the US to hear a related effort by a municipality to condemn private property for another private use. We believe we have a good chance of prevailing in the matter, which could take several years to ultimately resolve, even after the Supreme Court case.

We object to the City's attempt to adversely possess this trackage. We see other cars over there all the time, as well and know others are using it.

We urge the Board to deny the request.

Sincerely,

MIDWEST ASPHALT CORPORATION



Blair B. Bury,
Vice President



**Commercial Transload of Minnesota
7151 University NE
Fridley, MN**

Date: October, 20 2004

To: US Surface Transportation Board

While we are a wholly owned subsidiary of Minnesota Commercial Railway Co, we operate independently as a trucking and reload company. We primarily handle steel, but also some lumber and other construction products. Last year we handled over 1300 carloads of such business.

We actively market the Team Track on Butcher Spur as a location near an interstate and close to several smaller manufacturing and processing companies that do not have rail service and as a sight from which steel and wood construction products can be quickly transloaded and distributed in the area. We plan to use this siding more and more in the future. It is 5 miles closer to many customers and markets than our indoor reload facility and provides us with some additional capacity as well.

Sincerely,



Director of Operations

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2004, I served the foregoing document, Reply To
Petition For Waiver And Exemption, on John D. Heffner, Esq., 1920 N Street, N.W., Suite 800,
Washington, DC 20036, by UPS overnight mail.

Thomas F. McFarland

Thomas F. McFarland